IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/06/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1406 of 1991
and
C.M.P.NO.12546 OF 1991

T.M.Manicka Naicker .. Appellant

-Vs-

1. N.J.Chandrasekar
2. Deenarakshi Ammal .. Respondents

The above Second Appeal is directed U/s 100 of C.P.C. as stated therein.

For Appellant : Mr.T.V.Krishnamachari

For Respondents : Mr.J.R.K.Bhavanantham

:JUDGMENT

This Second Appeal is directed against the judgment and decree dated 12.7.1991 rendered in A.S.No.89 of 1990 by the Court of District Judge, Chengai Anna District at Chengalpattu, thereby confirming the judgment and decree dated 30.7.1990 rendered in O.S.No.199 of 1984 by the Court of District Munsif, Chengalpattu.

2. Tracing the history of the above second appeal coming to be preferred what comes to be known is that the appellant herein has filed a suit against the respondents in O.S.No.199 of 1984 on the file of the Court of District Munsif, Chengalpattu praying for a declaration, declaring the plaintiff's title over the suit properties, for a permanent injunction restraining the defendants from in any manner alienating the suit properties or from interfering with the plaintiff's possession over the suit properties and for costs on averments such as the plaintiff is the absolute owner of the suit properties measuring to an extent of 0.86 cents situated at No.260 Edaiyur Village; that the plaintiff purchased two items of suit properties from one Jambulinga Naicker for a valid consideration of Rs.2,000/- in February 19 55 and it was agreed that the document would be written and registered within six months from February 1955; that the said Jambulinga Naicker is a very rich man and the plaintiff could not approach him very easily; that the matter was postponed and thereafter Jambulinga Naicker fell ill and he died within few years; that the first defendant and his deceased

brother N.J.Thirunavukkarasu who are the sons of Jambulinga Naicker were promising to execute the document; that after the death of their father they have also postponed the execution of the sale deed, stating that the plaintiff is in undisturbed possession of the land, paying kist of the land and there will not be any difficulty or threat of dispossession at the hands of the first defendant and his deceased brother N.J.Thirunavukkarasu; that the plaintiff believed the words of the 1st defendant and his brother paying kist to the suit properties; that the plaintiff is in possession of the suit properties as its owner and cultivating the same personally from the year 1955 onwards and thus he has prescribed title by adverse possession; that there is no sale deed executed and registered in his favour though the entire sale consideration has been paid in pursuance of the oral agreement; that in any event the plaintiff's possession has to be protected; that the defendants demanded with the plaintiff to pay the market value for the suit properties, so that they could execute a sale deed, for which the plaintiff was not amenable to pay the difference in price as on this date, hence the 1st defendant is trying to sell the properties to the third parties; that under these circumstances there is likelihood of disturbance of possession. On such averments the plaintiff has filed the suit praying for the reliefs extracted supra.

3. In the written statement filed by the defendants, they besides generally denying the allegations of the plaintiff, would further specifically allege that the suit is not maintainable in law as well as on facts; that the three items of the suit properties at Edaiyur Village were allotted to the share of Jambulinga Naicker, the father of the first defendant under a registered partition deed dated 3.6.1935 and that the deceased Jambulinga Naicker became the absolute owner of the three items of the suit properties; that he had been in possession and enjoyment of the suit properties continuously and uninterruptedly until his life time; that he was paying kist by himself or through caretakers, his brother-in-law, Rudhrakotti; that his brother-in-law Rudhrakotti was managing and supervising the cultivation on behalf of the deceased Jambulinga Naicker; that Jambulinga Naicker died on 7.12 .1964 leaving behind his son the first defendant, his deceased son Thirunavukarasu, his daughters and daughter of predeceased daughter, the second defendant herein is the wife of Thirunavukarasu; that they inherited the suit properties and other properties as the legal heirs of the deceased Jambulinga Naicker and they were in joint possession and enjoyment of the same until the date of partition; that their maternal uncle, Rudhrakotti managed and supervised the cultivation on behalf of them; that they paid kist for the suit properties; that they divided the suit properties and other properties by metes and bounds under a registered partition deed dated 17.8.1971; that the first item of the suit properties was allotted to the share of the first defendant; that the second and third items of the suit properties were allotted to the share of the husband of the second defendant; that the defendants were in exclusive possession and enjoyment of their respective shares in the suit properties continuously and uninterruptedly; that after the death of Rudhrakottii his son Umakanthan was managing and supervising the cultivation of the first item of the suit properties and his another son Ganesan was managing and supervising the cultivation of the 2nd and 3rd items of the suit properties; that the husband of the second defendant died on

2.9.1976 leaving behind the second defendant, her son and daughter and they inherited the second and third items of the suit properties.

4. The defendants would further submit that they deny the allegation that the suit properties were purchased by the plaintiff in the year 1955 for a consideration of Rs.2000/- from Jambulinga Naicker and that he promised to execute the sale deed within six months from February 1955 and that he postponed the execution and the registration of the sale deed; that it is absolutely false to state that the first defendant and his brother Thirunavukarsu promised to execute the sale deed and postponed the execution of the sale deed and that the plaintiff was in undisturbed possession of the suit property and that he was paying kist for the suit properties; that the kist receipts, chitta and adangal extract are fabricated documents and they do not relate to the suit properties; that the plaintiff was wielding influence with the Revenue Officials and manoeuvred to fabricate documents; that they are not genuine and are not binding on the defendants; that the plaintiff was never in possession of the suit properties; that it is absolutely false to state that the plaintiff prescribed title to the suit properties by adverse possession; that taking advantage of strained relationship in between the defendants and their maternal uncle's sons, the plaintiff has been set up by them; that the defendants were issued patta; that the defendants have been paying kist through their caretakers; that the question of part performance will not arise; that the provisions of Sec.53-A of Transfer of Property Act does not attract; that there was neither oral nor written agreement of sale in respect of the suit properties;that the plaintiff is not entitled to any right, interest and title to the suit properties; that it is absolutely false to state that the plaintiff bona fide believed Jambulinga Naicker as well as his sons; that the question of threat to possession of the suit property is a pith and substance of falsehood; that the allegation in the plaint that the first defendant arranged to sell the properties to the third parties and that there would be likelihood of disturbance to possession are all absolutely false; that the inclusion of the third item of the suit property after amendment of the plaint would falsify the allegation of the purchase and possession of the suit properties; that there is no cause of action for the suit; that the plaintiff is not entitled to decree for declaration of title and for permanent injunction; that having alleged falsehood, the plaintiff is not entitled to discretionary relief; that the suit is barred by limitation. On such averments the defendants would pray to dismiss the suit with costs.

5. The trial Court based on these pleadings would frame 7 issues for determination of all the questions which are involved in the whole suit and would allow the parties to record their evidence both oral and documentary as a result of which on the part of the plaintiff he would not only examine himself as P.W.1, but also would examine 4 other witnesses as P.Ws. 2 to 5, for oral evidence, besides marking 17 documents as Exs. A1 to A17 for documentary evidence, Exs.A1 to A7 , Exs.A10 to A12, A14, A16 and A17 being the kist receipts for the faslis 1381, 1382, 1385, 1383, 1386, 1387, 1389, 1390, 1391, 1393, 139 4, 1395, 1395, 1396, 1398, 1398, 1399 in favour of the plaintiff, Ex.A8 and A9 being the kist receipts for the faslis 1394 and 1395, in favour of Chandrasekar, Exs.A13 and A15 being the kist receipts for the fasli 1398 in favour of Dhanarakshani and Chandrasekaran.

6. Likewise, on the part of the defendants they would examine the first defendant as D.W.1, for oral evidence in confirmation of their case put up counter to the plaintiff''s case and they would also mark 8 documents for documentary evidence as Exs. B1 to B8, Exs.B1 dated 17.8.71 being the registered copy of partition deed held in between the first defendants and his brothers, Exs.B2 and B3 being the kist receipts for the faslis 1348 to 1360 and 1373 to 1397, Exs.B4 and B5 being the copy of pattas, Ex.B6 being the copy of patta standing in favour of Jambulinga Naicker, Ex.B7 being the copy of UDR patta issued in favour of Chandrasekara Naicker, Ex.B8 being the copy of patta issued in favour of the 2nd defendant.

7. The Trial Court having traced the facts and circumstances of the case in the manner required by law and in appreciation of all these evidence placed on record in the context of the facts and circumstances of the case put up by the plaintiff and the defence case placed on record has ultimately dismissed the suit without costs, testifying the validity of which the plaintiff has preferred the appeal in A. S.No.89 of 1990 on the file of the Court of District Judge, Chengalpattu and the said Court also having traced the facts and circumstances as put-forth by parties before the trial Court and the other aspects relevant for consideration and having framed three points for determination of the appeal and in consideration of the facts pleaded and the circumstances brought-forth and the evidence placed on record by the trial Court and in appreciation of the same would concur with the findings of the trial Court in confirmation of its judgment and decree, thus dismissing the appeal preferred by the plaintiff as a result of which, left with no option, the plaintiff in the suit has now come forward to prefer the above second appeal on certain grounds as pleaded in the grounds of appeal. At the time of admission, this Court has framed the following substantial questions of law for determination of the legal questions involved in the second appeal:
(a) Whether the courts below have properly appreciated the scope of law relating to adverse possession?
(b) Whether the courts below have properly appreciated the scope and effect of Section 53(A) of Transfer of property Act to the facts and circumstances of this case?
(c) Whether the court below is right in law in relying upon patta which is not document of title?
(d) Whether the courts below have properly considered the material evidence of P.W.2 to P.W.5 while negativing the plea of adverse possession put forward by the plaintiff?

8. During arguments, the learned counsel appearing on behalf of the appellant would submit that on the date of filing of the suit on 13.6 .1984 the plaintiff was in possession; that the schedule of properties are three in number totally measuring an extent of 86 cents; that it is a suit for declaration and permanent injunction; that an interim injunction was granted and the plaintiff had the benefit of the same before the trial Court and the first appellate Court; that since the suit was dismissed the plaintiff preferred an appeal before the first appellate Court which dismissed the appeal ultimately and hence the second appeal; that from the year 1984 till date the appellant is in possession of the suit properties; that the plaintiff has proved the case of adverse possession; that the defendant also made oral

sale; that in spite of sufficient evidence having been let in on the part of the appellant before the lower Court for adverse possession since the same was not appreciated by the lower appellate Court, different conclusions have been arrived at by the first appellate Court. At this juncture, the learned counsel would cite the following judgments for proper consideration, they are respectively reported in (i) A.I.R.1993 CAL.144(FB) (RATANLAL BANSILAL AND OTHERS V. KISHORILAL GOENKA AND OTHERS) (ii) 2002(1)CTC 439(NEELAKANTAN & ORS. V. MALLIKA BEGUM) (iii) 1997(II) CTC 313 (IGNASIAMMAL V. MRS.FATHIMA BEEVI AND ANOTHER) (iv) 2000(IV) CTC 658 (S.N.ANANTHACHARI V. A.C.RAJAGOPALAN AND SIX OTHERS) (v) AIR 1986 MADRAS 106 (V.MUTHIAH PILLAI AND OTHERS V. VEDAMBAL AND OTHERS).

9. So far as the first judgment cited above delivered by the Full Bench of the Calcutta High Court comprising five Hon'ble Judges is concerned, while setting many questions of law the Full Bench has also resolved the competency of the second appeal under Section 100 C.P.C., thereby the Hon'ble Full Bench reversing its earlier judgment reported in (1988)1 Cal LJ 278, and its relevant to extract paragraph 64 of the above judgment and the same is as below:-

"Blackstone defines it as signifying that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue either on the one side or on the other. The word "Evidence" according to Taylor, includes "all the legal means exclusive of mere arguments which did tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation." According to Greenleaf, "evidence includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation is established or disproved." Thus, if the High Court can admit second appeal according to the Law Commission, on the legitimacy of the matter of dealing with evidence by the Courts below, the trial Court and the Court of Appeal, it cannot be said that perversity in finding of fact or misconduct in the collection and evaluation of evidence cannot be the subject-matter of appeal under S.100."

10. In the second judgment cited above, the Hon'ble Apex Court has held:

"In case where findings are recorded without any legal evidence on record or on misreading of evidence or suffer from any legal infirmity which materially prejudices case of one of parties or findings are perverse it would be open to High Court to set aside such findings and take different view."

11. In the third judgment cited above, the relevant point for the purpose of this case is Order 41 Rule 23 C.P.C. pertaining to remand regarding which it is held:

"No remand of suit can be ordered on ground that available evidence does not support respective case of plaintiffs and defendants assuming available evidence does not reveal the rival parties and suit cannot be remanded but appeal Court itself can deal with the matter."

12. The 4th judgment cited above is the judgment rendered by this Court itself wherein the trial Court for inadequacy of evidence had dismissed the suit and on some more material evidence placed on record before the appellate Court to accept the same for proper consideration and for arriving at the decision based on those evidence, in appreciation of the same, this Court has remanded the matter to the appellate Court.

13. The last judgment cited above reported in AIR 1986 Madras 106 is a judgment of a Division Bench of this Court wherein the limitation point regarding the question of adverse possession by a stranger has been resolved in the following manner:

"The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights, but denies them. Also a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.
The party claiming to hold the immovable property adversely must at least go on to prove that it was in denial of the owner's title and that he excluded him from the enjoyment of his property. Where a stranger is in possession it is not necessary to do so to the knowledge of the true owner, but it is sufficient if the possession is hostile, notorious and exclusive, so that the owner could perceive the same. There is a great distinction between adverse possession as between strangers and ouster pleaded in the case of co-owners. There is a basic difference between the two. In the case of adverse possession, as against strangers it is enough that adverse possession is overt, which should be without any attempt or concealment so that the person against whom time is running if he had exercised due vigilance he would be able to be aware of what is happening. It is not necessary that adverse possession should be brought home to the knowledge of the owner. Also, if the rights of the owner have been openly usurped and not secretly, he cannot be heard to complain that the fact of adverse possession was not brought to his knowledge."
On such arguments the learned counsel would pray to remand the case to the first appellate Court for proper consideration of the facts and circumstances as elicited in evidence framing proper point for a valid decision to be arrived at on the point of adverse possession pleaded by the appellant.

14. In reply, the learned counsel appearing on behalf of the respondent would argue on this evidence and circumstances which have already been brought forth in the pleadings and in evidence on the part of the respondents without any new fact or circumstance or law being argued, but praying to dismiss the above second appeal as without merit.

15. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both what comes to be known is that in a suit filed by the appellant praying for a

declaration of his title over the suit properties and for permanent injunction restraining the defendants, respondents herein from alienating the suit properties or from interfering with the plaintiff's peaceful possession over the same and for costs on averments extracted and elaborately discussed in the initial paragraphs of this judgment and the said suit has also been stoutly defended by the respondents. The trial Court in consideration of the oral and documentary evidence placed on record by both parties as brought forth in paragraphs 5 and 6 supra and in appreciation of the evidence on record issue-wise would ultimately dismiss the suit with costs, testifying the validity of which the appellant has preferred an appeal before the first appellate Court and the said Court also having framed proper points for determination of the appeal has ultimately concurred with the trial Court and confirmed the judgment and decree passed by the trial Court. Aggrieved, the plaintiff has come forward to prefer the above second appeal on grounds such as brought forth in the grounds of appeal and this Court has admitted the same for determination of the substantial questions of law framed as extracted in paragraph 7(a) to (d) of this judgment of which first and fourth substantial questions of law are pertaining to the point of adverse possession, the second substantial question of law is relating to the scope of part performance within the meaning of Section 53(A) of the Transfer of Property Act and the third one is relating to the conferment of title by patta.

16. Regarding the first and fourth substantial questions of law pertaining to the perfection of title by means of adverse possession, a careful study of the judgments rendered by the trial Court and the first appellate Court are concerned, they have respectively framed the issue and the point, and the lower Court in answering the question of adverse possession as per issue No.3 would show in its discussion that it is the case of the appellant that the suit properties were entrusted with him in the year 1955 on a oral sale and from that day onwards it is the appellant who is in possession and enjoyment of the same. On the contrary, the defence case is that one Rudrakotti was managing and supervising the cultivation of the suit properties on behalf of Jambulinga Naicker and on his death in the year 1964, his sons sons were in possession and enjoyment which according to the trial Court has been accepted by the plaintiff's witnesses particularly P.W.3; that even after the death of Rudrakotti his sons Umakanthan and Ganesan having been cultivating the suit properties, which fact also has not been denied on the part of the plaintiff.

17. Moreover, even the documentary evidence such as the kist receipt, the chitta and adangal registers would also indicate as to in whose possession the landed properties are, though Exs.A1 to A6 kist receipts pertaining to the years 1973, 74, 77, 78, 80 and 84 have been entered in the name of the plaintiff, still, Exs.A8 and A9 have been entered in the name of the first defendant, Exs.A13 and 15 have been entered in the name of the second defendant, that is to say that Ex.A series are not only in the name of the plaintiff, but also that of the defendants; that Ex.B2 series are 21 kist receipts bearing the name of Jambulinga Naicker from fasli 1348 to 1360 and therefore, the trial Court would arrive at a conclusion that in those periods

the suit properties have been in possession of Jambulinga Naicker. Likewise Ex. B3 series numbering 18 kist receipts pertaining to fasli 1373 to 1397 bear the names of Jambulinga Naicker and the defendants. In all these documents patta number and fasli number have been entered. Ex.B5, and B6 are the patta respectively standing in the name of the first defendant, the husband of the 2nd defendant and Jambulinga Naicker. Ex.B7 patta stands in the name of the second defendant. Considering these documents, the trial Court would say that it is not able to conclude that as per the case of the plaintiff he has been in possession of the suit properties from the year 1955 till the date of filing of the suit and therefore, the trial Court would not agree with the plaintiff so far as his perfection of title by means of adverse possession regarding the suit properties.

18. No doubt, that though it is on the part of the defendants to explain to the court as to how Ex.A series have been entered in the name of the plaintiff which they would only attribute a relative joining hands with the plaintiff and in connivance with the Revenue Officials such entries have been effected and though that is not a satisfactory explanation, still, in view of the Ex.B series of documents marked at a stretch referring the entire period standing in the name of the defendants or their father Jambulinga Naicker the adverse possession claimed on the part of the plaintiff since requiring continuous and uninterrupted possession for an unbroken period of 12 years cannot be held to be proved with strong documentary evidence since for the corresponding periods Ex.A series documents have been entered in the name of the plaintiff, they have also been entered in the names of the defendants as the original owner of the property and therefore, no easy conclusions could be arrived at regarding the plea of adverse possession.

19. Even regarding the Ex.A series of documents, most of them being kist receipts they cannot go to show the possession on the land by a party since anybody could pay the kist as it has occurred in the instant case that the authorities concerned have issued the kist receipts both in favour of the plaintiff and the defendants for one and the same period. The vital document to prove possession is the cultivation adangal extract which the plaintiff has failed to produce the statutory period of 12 years in a continuous and uninterrupted manner and in the absence of such evidence coupled with the shaky oral evidence cannot go to prove the plea of adverse possession and

therefore, the trial Court so far as this issue is concerned has arrived at the valid decision which requires the first appellate Court following the procedures established by law.

20. However, so far as the second point relating to part performance within the meaning of Section 53(A) of the T.P. Act is concerned, the trial Court and the first appellate Court as well have not bothered either to frame the issue and point or to determine this question. Since it is the case of the plaintiff that in the year 1955 he entered into a deal with Jambulinga Naicker on payment of a sum of Rs.2000/- in which the suit properties have been orally sold in favour of the plaintiff promising to do the registration formally in the due course and since the intended vendor being a very rich man

the plaintiff could not easily approach him to get a sale deed registered, but on the basis of the said oral sale deed the strong case of the plaintiff is that he was inducted into physical possession of the suit lands in part performance of the said sale. Of course, Ex.A series documents coupled with the evidence adduced on the part of the P.Ws. 1 to 5 would very strongly advocate that unless the plaintiff has been in possession of the suit properties the Revenue Authorities have no reason to enter the name of the plaintiff in the relevant Revenue records and to receive the kist from the plaintiff not for one fasli but for many and therefore, this Court is able to see the reason in the claim of the plaintiff for having parted with the sale consideration of Rs.2 000/- with the said Jambulinga Naicker particularly in view of the fact that the reason offered on the part of the plaintiff for having not got the sale deed registered in his favour as assured by the said Jambulinga Naicker since being quite natural and genuine for an economically weaker person as against a big landlord. Further since strong oral evidence has been let in so as to believe the version of the plaintiff to this effect and therefore, this plea of part performance of handing over the possession with the appellant since being a vital question for decision, neither the trial Court nor the first appellate Court seems to have focussed their attention on this vital question so as to frame issue of part performance within the meaning of Section 53(A) of the T.P. Act nor did the first appellate Court bothered about framing a point to the said effect and therefore, the appellant has reason in asking for a remand of the case for proper consideration of this vital and legal question in the light of the facts and circumstances of the case and hence on this scope, this Court is of the view that the above case requires to be remanded to the trial Court for proper framing of the issue and for additional evidence to be recorded based on such issue and determination of this question.

21. Coming to the next substantial question of law vital for consideration being the patta relating to the title of the suit property as the framing of this substantial question of law goes it is not that always that the patta is not the document of title. The patta is also the document of title but when it comes to the question of proving the title. The legal proposition held so far as is that mere patta cannot confer title and therefore, it goes without saying that patta could only consolidate and serve as an additional document of title with the some other document of title deeds such as the sale deed, the assignment order passed by the Government etc., and therefore, mere patta alone cannot confer title, but coupled with the other documents of title deeds, the patta would also go to prove the title of a person to a particular property. However, since the case in hand does not arise on mere patta but on part performance coupled with the patta and therefore, once the question of part performance is decided on a over all consideration of the facts and circumstances of the case, the oral and documentary evidence placed on record and the trial Court shall in the manner already discussed, record further evidence in order to determine the question of part performance giving effect to Section 53(A) of the T.P. Act considering the value of patta also in the light of the above observations made by this Court with due opportunity for parties to be heard and hence the following judgment:

In result,

(i) for the foregoing reasons assigned the above second appeal stands allowed partly;
(ii) the judgment and decree dated 12.7.1991 rendered in A.S.No.89 of 1990 by the Court of District Judge, Chengalpattu, thereby confirming the judgment and decree dated 30.7.1990 rendered in O.S.No.199 of 1984 by the Court of District Munsif, Chengalpattu are hereby set aside;
(iii) the case is remanded to the trial Court for framing the issue on the question of part performance pleaded by the plaintiff giving effect to Section 53(A) of the T.P.Act further allowing the parties to let in evidence and decide the said substantial question of law coupled with the appreciation of documents placed on record particularly the patta of the defendants;
(iv) However, in the circumstance of the case, there shall be no order as to costs.
(v) Consequently, C.M.P.No.12546 of 1991 is closed.

Index:Yes
Internet:Yes

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To

1. The Principal District Judge, Chengalpattu.
2. The District Munsif, Chengalpattu.